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THE ROYAL DISALLOWANCE IN MASSACHUSETTS

BY

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THE ROYAL DISALLOWANCE IN MASSACHUSETTS.

TO anyone interested in colonial problems, a study of the Royal Disallowance will throw considerable light on the colonial policy of any period. Nor is the question of merely academic interest even to-day. The British North America Act, the Commonwealth of Australia Act, the Constitutions of New Zealand and the Union of South Africa, all expressly recognize the Imperial right of disallowance. Since 1867 many Canadian bills have not become law. A number have been passed by the Canadian Legislature but refused the Royal Assent; others have been reserved and never passed. In respect to Provincial legislation alone, 70 provincial acts have been disallowed between 1867 and 1890.[1] An analysis of the reasons for the disallowance of these acts would help to explain the colonial policy of this period and to illustrate the method of Imperial control over colonial legislation. A study along these lines we believe might profitably be made of any colony at any period. It is here proposed, however, to examine the method and policy of Imperial control as expressed by the Royal Disallowance of Massachusetts Legislation between 1692 and 1775.

The practice of returning colonial laws for their approval in England goes back to the days when Virginia and Bermuda were governed by chartered commercial companies. On the dissolution of the famous London Co. in 1624, the Virginia colony became a Royal Province. The practice of sending back laws for approval was still retained, only the laws were now to be subject to the King's assent instead of to the approval of the Governors of a Commercial Company. In 1631 Virginia sent back the first collection of acts of a Royal Province ever transmitted to England for approval. By the end of the seventeenth century the routine of transmitting acts for the Royal approval had become fairly well established.[2] Certain

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[1]Keith. Responsible Government in the Dominions, 1908, p. 148.

[2]The best short account of the Royal Disallowance in all the American Colonies is an article on 'The Royal Disallowance,' published in the Proceedings of the American Antiquarian Society for October, 1914, by

of the charter colonies, however, like Connecticut, Rhode Island and Massachusetts were not actually required by the terms of their charters to send over their laws for approval, though this was sometimes done as a matter of course.

In 1684 Massachusetts lost her charter as the result of a long series of acts by which she had virtually assumed the powers and status of an independent commonwealth. In 1661 Massachusetts issued its famous Declaration of Rights by which she asserted her right to govern herself under her charter and protested against the restrictions of the navigation acts. Massachusetts had also excluded the Book of Common Prayer, restricted the franchise, laid the death penalty on religious opinions, coined money with her own seal and caused laws and writs to be drawn up in her own name. These are only a few of Massachusetts' many violations of the Royal Prerogative. Bearing these facts in mind the Andros régime, as far as Massachusetts was concerned, cannot be entirely blamed on 'Stuart Tyranny.'

By the settlement after the 'Glorious Revolution of 1688', Connecticut and Rhode Island were restored to the full enjoyment of their charter privileges. But owing to the past record of Massachusetts and to the fact that her charter had been annulled in 1684, it was obvious that she could not expect to enjoy her former liberties. A new charter was therefore given to Massachusetts in 1691[3] establishing her as a semi-royal province with a form of government midway between that of

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Professor Charles M. Andrews of Yale University. It was at Professor Andrews' suggestion that this short study of the Royal Disallowance in Massachusetts was first begun. A longer and more detailed study covering all the American Colonies is 'The Review of American Colonial Legislation by the King-in-Council,' by E. B. Russell, Ph.D. Columbia University Studies; vol. XLIV, No. 2, 1915.

[3]It is interesting to note that the old colony of Plymouth, founded by the Pilgrim Fathers in 1620 (or ten years before the great Puritan emigration to Massachusetts Bay), was formally annexed to Massachusetts in 1691. Plymouth never obtained a Royal charter of incorporation and hence her fate. Maine was also annexed to Massachusetts at this time and did not become a separate state till under the Union in 1820 as a part of the famous 'Missouri Compromise.' Massachusetts, Plymouth and Maine were therefore all under one government in 1691.

an independent charter colony like Connecticut and that of a Royal province like Virginia.

It is with the period of Massachusetts' history beginning 1691, therefore, that we are especially interested in this study, since from this time on Massachusetts was legally required to send over her laws for the Royal Approval or Disallowance.

By 1692 the colonial Governors of all the Royal provinces (i.e. of Massachusetts, New Hampshire, New York, Maryland[4] and Virginia) and of the proprietary colony of Pennsylvania were instructed to transmit their laws to England for approval. There was often a great deal of irregularity and delay on the part of the colonial Governors in sending over the laws of their respective provinces. Indeed it sometimes occurred that the acts of a whole session were not sent over at all, as, for instance, the acts of the Massachusetts Assembly for the session of 1694-5.[5] Omissions of this kind were of comparatively rare occurrence and no satisfactory explanation can be given beyond the neglect of colonial Governors and the failure at the British end of the administration to insist on the observance of the rule. A good many years elapsed before the British Government finally adopted anything like a uniform method of dealing with colonial legislation. To trace a colonial bill through its various stages is an interesting but often a very intricate process, especially since a bill might take anywhere from a month to ten years, and even longer, before any definite decision was reached by the British authorities. But though the methods of the British colonial administration were often dilatory and inefficient, they were not merely perfunctory nor mechanical, and they were above all else eminently fair and judicial. It should be noted in this connection therefore what was the real policy of the Board of Trade from about 1702 to 1730. The three year limit (fixed by the Massachusetts charter as the period within which her laws could be disallowed by the Privy Council) did not begin to run until these laws were actually laid before the council. The Board of Trade took ad-

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[4]Maryland was of course a proprietary colony during the greater part of its history; but from 1690-1715 Maryland was a Royal province.

[5]Acts and Resolves Public and Private of the Province of Massachusetts. 10 vols., 1692-1775. See chap. ix, xx, xxviii, Session 1694-5.

vantage of this restriction by withholding all colonial acts from the Privy Council until the effects of their operation should have been practically tested. If no complaint or objection was brought against any of these acts, and if they seemed to work satisfactorily, the act was allowed to continue in effect till repealed by the colonial Legislature. Therefore in tracing a colonial act through its various stages, the fact that no record of any action by the Privy Council exists, is not necessarily any evidence of crass negligence on the part of the British officials. It should be noted on the other hand that this policy of the Board of Trade was quite in keeping with the let-well-enough-alone policy of Walpole and Newcastle, and that the period from 1714 to 1728 was the period of greatest laxity of the Board of Trade.[6] For twenty-four years in succession Newcastle was the Secretary of State for the Southern Department which dealt with the colonies as well, and therefore absorbed many of the important functions of the Board of Trade.

However, the policy of the Board in allowing a colonial law to be probationary over an unlimited period either so that the success of its operation might be ascertained before sending it up to the Privy Council for confirmation or disallowance, or so that it might receive virtual confirmation through lapse of time, was no longer followed after 1730. From now on the Board was compelled to limit the probationary period to a definite term of two years, so that the number of colonial laws that received confirmation through lapse of time was greatly reduced. Moreover, all laws were required to be sent directly to the Privy Council which either in committee or as a whole submitted these acts to a preliminary reading before handing them over to the Board.

By about 1730, therefore, the following procedure in dealing with colonial legislation was generally adopted. First of

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[6]For a full account of the Board of Trade and Plantations, the changes in its personnel and powers from time to time, see American Colonial Government, 1696-1765, by Professor O. M. Dickerson (Cleveland, Ohio, 1902). For the Colonial administration before 1696, see British Committees, Commissions, and Councils of Trade and Plantations, 1622-75, by C. M. Andrews, 'Johns Hopkins University Studies in Historical and Political Science, 1908.

all, colonial acts were transmitted by the colonial Governor directly to the clerk-in-waiting of the Privy Council, though sometimes they were directed to the Secretary of the Board of Trade. Upon the receipt of the acts these officials duly delivered them to the Privy Council (or to a Committee of the Privy Council on Plantation affairs) for their perusal. The acts were then submitted to the Board of Trade for their official report and recommendations. The recommendations of the Board were usually accepted by the Privy Council but not necessarily. Opportunity was given at every stage for full discussion and deliberation. Often a colonial agent was called in and given a hearing before any matter of special importance was decided. The colonial agent representing Massachusetts was really chosen by the Massachusetts Assembly, who instructed him from time to time as to the course he should adopt. It would be an interesting problem to estimate the influence that colonial diplomacy in England exercised over the course of colonial legislation. There is no doubt but that this influence was often very considerable.[7]

Having briefly considered the method of dealing with colonial legislation, our next problem is to make an analysis of all the public and private acts disallowed by the Crown during the career of Massachusetts as a Royal province, i.e. from 1692 to 1775, a period of eighty-three years.[8] The number of acts disallowed for Massachusetts during this period is on the whole surprisingly small, as these were only 59 in all. Of this number 47 were public and 12 private acts. The distribution of these 59 disallowances over this period of eighty-three years is rather instructive, while the number of acts disallowed within certain periods and the reasons for their disallowance throws considerable light on the colonial policy of the time.

The 47 public acts will first be dealt with by an attempt to classify them according to the chief reasons for their disallowance. This scheme of classification is not always mutu-

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[7]See Provincial America, by E. B. Greene, The American Nation, vol. vi, p. 78, 1904; The Provincial Governor, by E. B. Greene, Harvard Hist. Studies, vol. vii, 1898.

[8]This analysis is based on the Acts and Resolves Public and Private of the Province of Massachusetts, 10 vols., 1692-1775.

ally exclusive, but in the main the reasons for disallowance fall under four definite heads:—

I. Colonial laws which were disallowed because they were contrary to the Laws of Navigation and Trade or were considered detrimental to English commerce and industry.

II. Laws repugnant to the Laws of England or that were not properly drawn up or were legally unsound.

III. Laws which disregarded the Royal Prerogative, or were contrary to the provisions of the Massachusetts Charter by which Massachusetts assumed unwarranted powers.

IV. Laws which in their operation might prove oppressive or harmful to either English or colonial subjects.

I. Massachusetts always had a somewhat unsavoury reputation in England for general insubordinacy which the troubles with Randolph and Andros had only served to exaggerate. The gravest charges urged against Massachusetts before she was deprived of her first charter and made a semi-royal province in 1692, were principally in regard to her violations of the laws of navigation and trade, and to her invincible opposition to any form of outside interference. It is not surprising to find therefore that eight of Massachusetts public acts were disallowed because they were contrary to the Laws of Navigation and Trade or were considered detrimental to English commerce and industry. The first two of these eight acts were repealed by the same order-in-council of Dec. 26, 1695. The first act[9] was passed by the Massachusetts General Assembly in 1693. When the Board of Trade came to consider this act, they called before them Mr. Brenton, the Collector and Surveyor of New England. His statement regarding the general effect of this act was incorporated in the representation of the Board to the Privy Council which recommended the disallowance of the act. The representation of the Board is worth noting because it throws light on local conditions in Massachusetts at this time, besides explaining the reason for the disallowance of the act. An extract from this document says: "The Port and Bay of Boston having more than a hun-

[9]Chap. ix, Mass. Acts and Resolves, 1693. Entitled 'An Act for coasting vessels within this Province.' Disallowed Dec., 1695.

dred sloops, shallops and lighters employed thereat, and by this privilege of lading to the quantity of six hogsheads of the enumerated commodities on each sloop without entry or clearing bond or certificate (as provided in the above act) it will not be difficult in a very little time thereby to load and unload any foreign ships of how great burthen so ever. Moreover, the Province of Narragansett Bay to Port Royal being about 300 leagues on ye sea coast in which space are contained some hundred harbours, creeks and coves." It was evidently the opinion of the Board that this act would afford too good opportunities for illicit trade, especially a further provision of the same act which "permitted the transportation of sugar and tobacco by land and water within the province on the *pretence* (as the Report puts it) of supplying the inhabitants only." This provision therefore of the act and the former clause which allowed a limited trade along the coast without any formal entry or clearing bond, were decided by the Privy Council "to be contrary to the usage and practice of the other Plantations and contrary to the acts of Navigation and Trade." It was therefore disallowed.

In the case of the second[10] of these two acts disallowed by the same order-in-council of Dec. 26, 1695, the reasons for disallowance are not so clearly expressed. If this act had been passed some time after 1700, it would probably not have been disallowed. But just at this time the policy of the Home Government was to make the trade regulations of the colonies conform absolutely to the English laws of Navigation and Trade. The representation of the Board of Trade to the Privy Council said in regard to this act: "But as the act for restraining the exportation of raw hides and skins. The said commodity not being enumerated in any of the laws of England for regulating and securing the Plantation Trade, are not properly under our cognizance. Yet for anything before us, we see not but what it may be a beneficial act and fit to be approved of, if it shall seem meet to His Majesty." Apparently

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[10]Chap. xix, Mass. Acts and Resolves 1692, entitled 'An Act to restrain the exportation of raw hides and skins out of the Province of Massachusetts Bay and for the better preservation and increase of deer in the said Province.'

His Majesty's Council were not disposed to give the act the benefit of the doubt nor to accept the recommendation of the Board. The act was therefore promptly disallowed on what was in reality a very trivial technicality.

The next act of Massachusetts to be disallowed because it came under our first classification was entitled 'An act for the regulating of the building of ships.'[11] The principal objection of the Board of Trade to this Act was that "it might lay an unnecessary restraint on the subject and tend to the obstruction of the building of ships." Another act [12] passed during the session of 1698 which was almost identical in its scope and purpose with the above act, was also disallowed. The act of 1698 contained a clause stating that the Province of Massachusetts desired some system of regulation and inspection such as existed in England. The Board of Trade, however, objected that this act was grounded on a mistaken opinion, because there was no such practice of regulation and inspection settled by law in England at this time. It is quite apparent that the technical objection to this act was not the real reason for its disallowance. It therefore properly comes under the first heading i.e. of those acts which were considered harmful to English trade and industry—in this special instance the shipbuilding industry of England. This fact is brought out in a report of the discussion on this act by the Board of Trade, in which we can get at the real reason for its disallowance. An extract from the Report of the Board said: "If this act be confirmed it would subject His Majestie's builders (in case it should here after be thought fit to build ships for His Majestie's service) to the inspection and control of overseers to be appointed by the Justices of Peace of that country. It would in like manner subject all merchants of England that may send thither to build ships for their own use to the same rule, which seems unto us inconveniences fit to be avoided."

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[11]Chap. xi, vol. I, Mass. Acts and Resolves, 1693.

[12]Chapter xviii, vol. II, Mass. Acts and Resolves, 1698. Entitled 'An Act for the regulating and inspecting of the building ofships.' Disallowed by order-in-council of Oct. 22nd, 1700.

The next Massachusetts act[13] to be disallowed because of its possible effect on English trade and commerce was passed during the same session as the last act. When this act was under the consideration of the Board, Mr. Brenton was again present. He stated as his objection to the act, "That several of the Ports to be established (by the act) have not one vessel belonging to them, nor have for several years past had any vessels unladen there except such as came privately and imported prohibited goods, and that two or three Ports are sufficient for that Province." The Board of Trade in this report to the Privy Council therefore recommended "That the establishing of so many ports in such inconsiderable places will not only occasion a greater charge in maintaining officers to attend them, but also be a great means to encourage and promote clandestine and illegal trade." There was also raised another objection to the act in point of law. A provision of the act stated, "that no other places besides those therein mentioned should be ports for lading or unlading ships trading to and from the province." It was the opinion of the legal advisors of the Crown that "this provision intrenched on the powers granted by Act of Charles II to the Lords of the Treasury" and that it was therefore "repugnant to the laws of England."

The next Massachusetts act to be considered under our first general heading was perhaps the most important of them all. This act was passed by the Massachusetts General Assembly during the sessions of 1718-19 and was entitled 'An Act for granting unto His Majesty's several rates and duties of import and tonnage of shipping.'[14] The unusual dispatch of the English administration in dealing with this measure gives some slight indication of its importance. The act was not sent to the Solicitor of the Board of Trade, Mr. West, but directly to the Commissioner of Customs, Mr. Carkesse, on Mar. 6th, 1719. On Mar. 14th Mr. Carkesse sent his official

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[13]Chap. xiv, vol. I, Mass. Acts and Resolves, 1698, entitled "An Act for establishing of seaports within this province and for ascertaining the fees for entering and clearing of vessels inward and outward bound." Disallowed by order-in-council of Oct., 1700.

[14]Chap. xii, Mass. Acts and Resolves, session of 1718-19.

opinion to Mr. Wm. Popple, Secretary of the Board of Trade, which was embodied in the recommendation of the Board to the Privy Council, Apr. 24th. The recommendation of the Board[15] was accepted and on May 26th, 1719, an order-in-council was passed disallowing the act. The chief objection to the act was its downright violation of the Acts of Navigation and Trade, but above all its amazing proposition of laying a discriminating tax on all English goods as a direct discouragement to British trade. From the speech of Governor Shute to the Massachusetts Assembly on Nov 4th, 1719, it appears, however, that at the May sessions of the Assembly immediately following the passing of this act, the particularly offensive clause which laid a duty on all English goods and shipping had been repealed. But in the words of Governor Shute, "the more effectively to prevent our being guilty of so fatal an error in the future, I am expressly commanded to represent both to the Council and Assembly in the words

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[15]This document is so full of interest that I venture to quote it in part. Quoted in note to Chap. xii, Mass. Acts and Resolves, vol. II. "By Act of Trade no goods of the growth or manufacture of Europe can be imported to any plantation but from Great Britain excepting salt for fisheries, wines of the Madeira and Western Islands, *servants*, horses and provisions from Ireland, and also except Irish linens. Whereas this Act of Mass. Bay not only allows the importation of all sorts of wines and commodities directly from their place of growth but *charges the commodities with a double duty if imported from this Kingdom*, from where only can they legally be imported, except in the cases above mentioned. The Act likewise *lays a duty of one per cent. on all English merchandise; and as a further discouragement to British Trade and Navigation lays aduty of Tonnage on all shipping* except that of Massachusetts Bay and some few neighboring colonies. It is also further observable that the ship with her tackle, etc., is lyable to answer such penalties and forfeitures as the master shall incur by not observing the Act, which would be very unreasonable and a great hard ship on British and all other owners of shipping entitled to trade thither. . . . . This Act was but *very lately delivered to us and will have had its full effect before your Majesty's pleasure there on can be known in the Province.* However, considering that it is of so very extraordinary a nature, we humbly propose that your Majesty may declare your disapprobation thereof as being repugnant to the laws of the Kingdom by which the Plantations are and ought to be bound, and consequently illegal and void to all intents and purposes what so ever. And for as much as

following: 'That as the power of making laws which was granted to this government by their late Majesties is restrained to the condition that such laws shall not be repugnant to the laws of Great Britain; they will do well to consider how far the breaking this condition and the laying of any discouragement on the shipping and manufactures of Great Britain may endanger the charter.'[16] This, gentlemen, is a warning from the Throne, and I hope will prove a means to preserve us in our dutiful dependence on and subjection to the Crown and Government of Great Britain upon which (under God) the constitution and prosperity of this country entirely depends."

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this *Act seems designed to be an annual one*, we would propose that in case it shall have been re-enacted this year, before the Governor receive your Majesty's orders on this head, he be enjoined forth with to declare your Majesties disapprobation thereof and not to permit the said Act or any part of it to be put in execution. And to prevent so pernicious practise for the future we would further propose that your Majesties' Governor of Massachusetts Bay may have orders to represent to the Council and Assembly of that rovince that as the power of making laws granted to them by their charter by their late Majesties King William and Mary is restraining to the condition that such laws be not repugnant to the laws of England, *they will do well to consider how far the breaking of this condition and the laying of any discouragements on the shipping and manufactures of this Kingdom may endanger their charter.* We believ it necessary that at the same time the Governor himself should be p in mind *of the obligations he is under by the oath* he took before h entrance on the former government *to put the Laws of Navigation and Trade in due execution*, as well as by your Majesty's instructions to him Sept. 27th, 1717, not to pass any acts which may effect the trade and shipping of this Kingdom without a clause there in to be inserted declairing that *the said Act shall not be in force until the same shall be approved and confirmed* by your *Majesty, your Heirs and Successors.*" This reference to a suspending clause, by which nothing in an Act should have force until the King's will had been expressed, is the first I have found among the Mass. Acts. In spite of the emphatic language employed here, as far as I have been able to find out, Mass. was *never guilty of obeying* this instruction.

[16]This is plainly taken directly from the recommendation of the Board of Trade of April, 1719 (see Note 15), speech of Gov. Shute, Council Records, vol. X, p. 457.

The last act[17] to be considered under the head of those harmful to English commerce and industry was passed during the Sessions of 1749-50 and was disallowed by order-in-council of June 30th, 1752. This act proposed to raise the Governor's salary by laying a duty on certain articles. The idea of taxing English trade to support an English Governor may have appealed to Massachusetts but it found no favourable response in England. It was objected by the legal advisor of the Crown, Mr. Lamb, "that the proposed excise would affect the trade of this Kingdom and at the same time run counter to the 16th article of the Governor's instructions regarding the support of the Governor." The act was therefore disallowed.

II. Under this second head are to be classified all Massachusetts laws disallowed because they were repugnant to the laws of England or because they were not properly drawn up or were legally unsound. A Massachusetts Act of 1698[18] has already been noted as being disallowed, not only because it was considered harmful to English trade but also because it was 'repugnant to the laws of England.'

The next act[19] to be considered under this second head was one of the most important of this group. This act represented the programme of the popular party in Massachusetts. It claimed for the Assembly the right to appoint all civil officers not particularly designated in the charter,[20] besides the complete control of all public expenditures. All official sala-

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[17]Chap. xxi, Mass. Acts and Resolves, vol. II, Session 1749-50. Entitled 'An Act for granting unto His Majesty an excise upon sundry articles here after enumerated for and towards the support of His Majesty's Government of this Province.' See also Chap. xi, 1692-3, Note 19.

[18]Chap. xiv, Mass. Acts and Resolves, 1698. Entitled 'An Act for establishing of sea ports,' etc. See Note 13.

[19]Chap. xi, Mass. Acts and Resolves, 1692-3. Entitled 'An Act setting forth general Privileges.'

[20]This was always the traditional view of Mass. towards her charter, i.e. to claim not only all rights and privileges expressed in her charter but also every power not expressly denied by it.

ries were to be fixed by the Assembly, and whenever revenue was to be raised, the Lower House was to be apprised of the purpose for which it was to be used. Moreover, this act provided that no money was to be expended except for certain definite objects to be specified by law. Except in the case of contingent charges every warrant was to indicate the specific service for which the money was used and the law by which it was authorized. The act also contained a clause by which 'bail should be taken in all cases *except* Treason and Felony plainly expressed in the warrant of commitment.' The legal advisors of the Crown immediately seized on this last clause as 'being repugnant to the laws of England,' and the whole act was therefore disallowed on a technicality in point of law by the order-in-council of Aug. 22nd, 1696. It is clear, however, that this was not the real objection to the act. The policy of the Home Government at this time (1692-3) was very definitely to keep the government of the colony as far as possible within the control of the Crown. But this act was designed by the popular party in Massachusetts to regain the privileges enjoyed by them under their old charter. As subsequent history shows however, the disallowance of this act and of other acts, did not prevent the Massachusetts Assembly from carrying out substantially the policy indicated above. In the face of constant protests from the Governor and the Home Government the Assembly refused to make permanent provision for the civil list. The Governor's salary was voted only year by year; the provincial Treasurer was appointed by Act of Assembly and all expenditures were controlled by definite appropriations.

Closely related to the above act and disallowed by the same order-in-council was another act[21] of the same session which also represents the programme of the popular party in Massachusetts. This act was likewise disallowed on a legal technicality, but really because its popular tendencies were

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[21]Chap. xlii, Mass. Acts and Resolves, 1692-3. Entitled 'An Act for the better securing of the liberty of the subject and for the prevention of illegal imprisonment.' Disallowed by the order-in-council of Aug. 22nd, 1695.

distrusted by the somewhat reactionary Government after the Revolution of 1688.

Three acts[22] still remain to be dealt with which were also disallowed by the sweeping order-in-council of Aug. 22, 1695.[23] The first of these acts was entitled 'An act for punishing capital offenders.' There were three principal objections to this Act. First, that the articles in this act relating to Witch craft, Blasphemy, Incest and Slaying by Devilish practises were worded in too 'uncertain and doubtful' terms. Second, that these crimes were all to be punishable by death, as well as unpremeditated murder which was 'not conformable to the laws of England.' Third, that a clause in the act relating to Treason 'was not agreeable to statute law of England.' The second act against counterfeiting, clipping, filing or impairing of coins was disallowed, because it was 'thought fit that crimes should be punished as they were in England.' The third act against conjuration, witchcraft and dealing with evil spirits was also disallowed because it was not in accord with the statute law of England.

The next act[24] to be considered, while nominally disallowed as being repugnant to the laws of England, was really disallowed because it affected the enforcement of the Navigation Acts. Its disallowance represented an attempt of the English Government to back up their Vice-Admiralty Courts against the local Colonial Courts in dealing with all breaches of the laws of Navigation and Trade. The legal advisors of the Crown had immediately pounced on one particular clause of this act which seemed to afford a possible loophole for avoiding the penalties of the detested Navigation Acts. The official opinion of the Board of Trade was that "this Act, providing among other things that all matters and issues shall be tried by a jury of twelve men, has in that particular

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[22]Chap. xix; chap. xxxi; chap. xl, Mass. Acts and Resolves.

[23]By this important order-in-council of Aug., 1695, 35 Mass. Acts were confirmed and 15 disallowed.

[24]Chap. ix, Mass. Acts and Resolves, Session 1696. Entitled, 'An Act for establishing courts.' This was one of six other acts passed between 1695-97 and disallowed by the same order-in-council of Nov. 24th, 1698.

been looked upon to be directly contrary to the intention of the Act of Parliament[25] by which it is provided that all cases relating to the breach of the Acts of Trade may be tried in His Majesty's Plantation respectively where such offence shall be committed. Moreover, the method of trial in such Courts of Admiralty is ... by juries of 12 men as is directed by the afore mentioned act for establishing courts.' It was perfectly obvious that no jury of 12 Massachusetts men would ever convict their neighbours of smuggling, or confiscate suspected goods in which they all might have a personal interest. The disallowance of the act was a foregone conclusion.

A group of six Massachusetts acts will next be considered under our second general head of acts not properly drawn up or legally unsound. These six acts[26] were disallowed because they all related to a former act which had been previously disallowed unknown to the Massachusetts Assembly. This act[27] proved to be a joker. It was passed in the first session of 1692-3 and was not disallowed till three years after by the sweeping order-in-council of August, 1695. In the meantime these six additional acts were passed, all depending on the original Act of 1692 regarding which the Massachusetts Assembly was not yet aware that the Home Government had any particular objection. These six acts would certainly not have been passed—and most certainly not disallowed—if the Colonial Legislature had known in time about the disallowance of the original Act of 1692. But in the nature of the case owing to time, distance and delay this was literally impossible.

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[25]Entitled 'An Act for preventing Frauds and regulating Abuses in the Plantation Trade.'

[26]Chap. xi. Entitled 'An addition to the Act for establishing judicatories,' 1693-4; chap. xx, entitled 'An Act of supplement and addition to several acts of this province,' 1693-4; chap. xviii, 'An Act in further addition to an Act, etc. etc., 1694-5; chap. v, 'An Act for the Reviewing of Judicatories,' etc., 1695-6; chap. ix, 'An Act of supplemental and addition to several Acts,' etc., 1695-6; chap. xii, 'An Act for the establishment and regulation of Chancery,' 1693-4.

[27]Chap. xxxiii, Mass. Acts and ... Entitled 'An Act for the establishing of Judicatories and Courts of Justice within this Province,' 1692-3. Disallowed by order-in-council of August, 1695.

Two other acts of the first session of 1692 were also disallowed because they were not properly drawn up and were legally unsound. The first of these two acts was entitled 'An act for continuing Local Laws.'[28] Curiously enough this was the very first act entered in the Acts and Resolves of Massachusetts Bay. It was disallowed because the acts to be continued were not particul[illegible] specified. The second of these acts[29] was entitled 'An Act for the reviving of an Act for continuing local laws, and another act for sending of soldiers to the relief of the neighb[illegible]ring Province and colonies.' This Act was passed during the November session of 1693 and (as the title indicates) included Chap. I mentioned above which had now expired. Both of the acts were di[illegible]allowed in August, 1695. Regarding the disallowance of these two acts the Board of Trade stated that: "The practise of joining together diverse acts or clauses upon different subjects under the same title is a great irregularity and in some occasions may tend to the prejudice of the Province, where of we judge they will find an instance in the above act in which some of those additions might have been approved if they had been separately enacted."[30] After 1695, therefore, strict instructions were issued to the effect "that in any new law to be enacted, the law to be continued be therein expressed and particularly specified."

But the passing of Colonial Acts like Chapters I and XLIII mentioned above was open to another serious objection. For though these two acts were eventually disallowed in 1695, in the meantime they had effected their purpose and had expired. The Royal Disallowance and the claim to control Colonial Legislation would be a farce if the practice of passing merely temporary laws were permitted to go on unchecked. The English Government therefore sent over some very definite instructions to the Governor of Massachusetts in regard to this question of temporary laws. "There is another undue practise grown also too common in the Association of Massa-

[28]Chap. i, Mass. Acts and Resolves, Session 1692-3. Disallowed by order-in-council of August, 1695.

[29]Chap. xliii, Mass. Acts and Resolves, Session 1693. Disallowed by order-in-council of August, 1695.

[30]Letter of Board of Trade to Governor Bellomont, Dec. 26th, 1695.

chusetts Bay which is the making of several laws temporary and renewing the same from time to time.. . . .It is His Majesty's express will and pleasure, that all laws whatsoever for the good government and support of the said colony be made indefinite and without limitations of time except the same be for a temporary end and which shall expire and have its effect within a certain time, and therefore you shall not enact any law which shall have been once enac by you except upon very urgent occasions, but in no case more than once without His Majesty's express consent. And as we observe the same method to grow too much in use in the Province of Massachusetts Bay we cannot but recommend the observation of the foregoing instruction to your Lordship's care."[21] Despite the many practical difficulties of carrying out these instructions, they were made even stricter by further instructions to all the Provincial Governors which directed them, in the case of all acts relating to important matters of Trade or Imperial interest, to insert a Suspending Clause, declaring that the said act should not go into force until the same should be approved and confirmed by His Majesty. Though very definite instructions were given regarding a suspending clause, as far as I know Massachusetts was never guilty of complying with this order. On the other hand, there are three quite clear instances where Massachusetts Acts were disallowed because they did not contain the offensive suspending clause. The first of these acts[22] was disallowed on two counts, inasmuch as it violated the orders of both sets of instructions mentioned above, first as regards the passing of temporary acts, and second as regards the inclusion of a suspending clause. The first clause of this act, it was objected by the Board, was a temporary law and was expired, but that upon the expiration of the said clause it was revived again and was then in force, which entirely destroyed the reasons given for the law. The second objection was owing to the fact that this

[21]Letter of Board of Trade to Gov. Bellomont, Dec. 26, 1695.

[22]Chap. xvi, Mass. Acts and Resolves, Session 1730-31. Entitled 'An Act in addition to an Act for ascertaining the members and regulating the House of Representatives.' Disallowed by order-in-council, Jan. 10, 1734.

act contained no clause for suspending its taking effect until His Majesty's pleasure should be declared.

The next of these three acts was passed seven years later. This act[33] contained a clause which increased the number of Representatives in the Massachusetts Assembly. This was, however, regarded by the Home Government as a question affecting Imperial control, and in 1743 definite instructions had been issued by the Privy Council to Governor Shirley forbidding him to give his assent to any act which would tend to increase the number of Representatives in the Assembly without a clause therein inserted suspending the execution of such act until it should receive the Royal assent. The same instructions had been continued to Thomas Pownall who was Governor of Massachusetts at this time. Thomas Hutchinson[34] who was to be the next Governor of Massachusetts in 1760, strenuously opposed this act in the Council and was probably very influential in having it disallowed. His main objections to the act were "that the increasing the number of Representatives would retard the proceedings of the General Court, would increase the burden which now lyes on the people by their long session every year, and would give the General Assembly an undue proportion to the Board in the Legislature." The objections raised by Thomas Hutchinson were substantially the same as given by the Board of Trade in their representation to the Privy Council. For the above reasons and because it had no suspending clause the act was disallowed.[35]

The last of the three Massachusetts Acts that I have found to have been disallowed because of the omission of a suspending clause was passed in 1765 during the Governorship

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[33]Chap. i, Mass. Acts and Resolves, 1757-8. Entitled 'An Act for erecting the district of Danvers 'nto a Township by the name of Danvers.' Disallowed by order-in-council, Aug. 10, 1759.

[34]History of the Province of Massachusetts Bay, 1749-1774, by Thos. Hutchinson, 1828; Lieutenant-Governor in 1760 and again in 1769, Governor 1771-1774.

[35]The question of Representation in the colonies was a vital one. The point of view of England at this time was so hopelessly at variance with the Colonial point of view that a conflict was inevitable. For a short but interesting discussion of this topic see Students History of the United States, by Edward Channing, pp. 140-144.

of Francis Bernard. The circumstances under which this act[36] was passed were somewhat complicated. This was the act[36] was passed were somewhat complicated. This was the year, it will be recalled, of the memorable Stamp Act Congress and the relations between the Colonies and the Mother Country were daily becoming more strained. This also appears to have been a period of financial depression in the colonies. Many colonial merchants were very heavily in debt to their English creditors and some had tried to repudiate their obligations. Hence the passing of the two acts for the preventing of frauds, etc., referred to in the Act of 1765 (chap. v). However, the Massachusetts merchants had found the working of these two acts for the preventing of frauds, etc., so unsatisfactory that the Act of 1765 had been passed repealing them both. At first Governor Bernard had opposed the repeal of these two acts. He maintained that they ought to be amended rather than repealed, since it would be a greater inconvenience and abuse to repeal these two acts without fair warning especially to British creditors who were relying on their operation, than to continue them in an amended form. Considerable pressure was brought to bear on Governor Bernard by the Massachussets Assembly, and at last in September 1765, he gave his consent to the repeal of the two acts on the ground that sufficient warning had by now been given to all creditors. The Board of Trade, however, was quite unfavourable to the repeal of these two acts by the Act of 1765. The Board had hoped that some "provision in cases of insolvency might have been made in this, as in most other colonies, a permanent part of the constitution."[37] It was therefore the opinion of the Home Government that these two acts were "essential to public credit and to the security of the foreign creditor," and that the action of Governor Bernard in giving his assent to the Act of 1765 was entirely unwarranted, since he had taken

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[36]Chap. v, Mass. Acts and Resolves, 1765-6. Entitled 'An Act for repealing two Acts, one entitled an Act for preventing fraud in debtors and securing the effects of insolvent debtors for the benefit of their creditors, and the other entitled an Act in addition to an act for preventing fraud in debtors,' etc. Disallowed by order-in-council July 24, 1767.

[37]From Report of Board of Trade, June 28th, 1767.

this important step "upon a general suggestion of inconvenience unaccompanied with any representation of what that inconvenience was, or without any clause *suspending the execution of this act* until His Majestie's pleasure could be known." The act was therefore disallowed by order-in-council, July, 1767.

In order to complete the list of acts coming under this second general heading two more remain to be mentioned. The first of these acts was passed in 1698 and was entitled 'An act for establishing precedents and writs.' The act was disallowed in 1700 on the advice of the Solicitor General because in his opinion "the conditions of the act were incongruous and unreasonable," and that therefore it was legally unsound. The last of these two acts was passed in 1757 and also referred to the question of the collection of debts. A number of English merchants were given a hearing before the Board in regard to this act. It was the opinion of the Board that the act as drawn up did not serve its purpose. It was therefore disallowed, July, 1758.

III. Under this third head are to be classified all Massachusetts laws disallowed because they disregarded the Royal Prerogative or were contrary to the terms of the Massachusetts Charter by which the colony assumed unwarranted powers. In the light of Massachusetts history prior to becoming a Royal province in 1692 and of the definite policy of the Home Government at this time to bring the colonies into closer dependence on the Crown, we are quite prepared to find a number of Massachusetts acts disallowed for the above reasons. The period after 1692 was a period of adjustment for Massachusetts and hence we find that five of these acts occurred within the first seven years of Royal control.

The first of these was 'An act for the incorporation of Harvard College at Cambridge, New England'.[88] The act was disallowed because it "reserved no power of the King to appoint a visitor for the better regulating of the college which power should be reserved to the King and Governor". The Board of

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[88]Chapter x, Mass. Acts and Resolves, vol. I. Disallowed order-in-council of Aug. 22, 1695.

Trade when notifying the Governor of the disallowance of this act, intimated that the General Assembly might renew the same act only with "a power of visitation reserved to his Majesty and the Governor or Commander-in-chief of that province". Two years after this act had been disallowed a second act[39] for the incorporation of Harvard was passed but still it did not comply with the necessary regulation of a visitor appointed by the King or his representative. Instead this act provided that the power of visitation was to be vested in the King or his representative *together with* the council of the province for the time being which, as the Board complained, "was very different from what was proposed to them to be observed". This second act was therefore disallowed because it did not recognize the Prerogative of the Crown and had not been formed according to His Majesty's former order-in-council. However, Massachusetts legislators managed to carry their point and still not formally recognize the Royal right of visitation. They passed a short resolution in 1707 declaring the old charter to be still in force, thus avoiding all risk of a third objection. This came to be the usual method by which Massachusetts contrived to avoid a direct clash with the home authorities and still to get her own way. No doubt many more of her acts would have been disallowed but for this scheme of adopting as resolutions what as legislative acts would have eventually reached the home authorities only to be negatived.

The next act[40] to be noticed, like the preceeding act, was also disallowed because of its omission to recognize the prerogative of the Crown in regard to appointmnts. The purpose of the act was to erect a naval office in the province. The powers and directions given to the naval officer, had by a previous Act of Parliament, been reserved to such officer or officers as should be appointed by the Commissioneers of His Majesty's Customs. By the provisions of this colonial act these powers were to be delegated to the Provincial Governor. The act was therefore disallowed Aug. 22nd, 1695.

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[39]Chap. x, Mass. Acts and Resolves, 1697. Disallowed order-in-council, November, 1698.

[40]Chap. vi, Mass. Acts and Resolves. Entitled 'An Act for erecting a naval office.'

The next three acts[41] to be considered were all passed by the first Massachusetts Assembly under Royal control, and were all disallowed in Aug. 1695, because of their failure to recognize the prerogative of the Crown. The first of these acts was disallowed because "by ye act no provision is made for ye saving of His Majesty's right, ye said act is repealed." The Privy Council also advised that "in the framing of a new act to the same effect a clause may be inserted for saving the rights of the crown". A further objection was also made against the act in point of law. It was thought by the attorney and solicitor general that the term of three years possession proposed by the said act was too short for the confirmation of titles and in a new draft of the act, ought to be extended.

The last two of these three acts of 1692 were both disallowed, so that in the framing of two new acts clauses might be inserted in each whereby the debts due the Crown should be preferred to all others.

The next act[42] to be noted was considered by the Board of Trade to infringe on the Royal patents granted to the Post Master General of His Majesty's Dominions. It was also thought to be inconsistent with the Royal patent granted to Thomas Neale, Esq., for the Post Office in America. It was therefore disallowed.

The next act[43] to be disallowed because of its disregard for the prerogative of the Crown, came at a very critical period in Colonial history. The reason for disallowance, as stated by Mr. Jackson (Solicitor of the Board), was because the Act placed certain powers of granting licenses in the hands of the select men of the towns, "when it is more fit that such power

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[41]Chap. xii, Mass. Acts and Resolves, Session 1692. Entitled 'An Act for Quieting of possessions and settling of Titles.'

Chap. xvi. 'An Act for the equal distribution of insolvent debtors.'

Chap. xxix. 'An Act for making land and tenements liable to payment of debts.'

[42]Chap. iii, Mass. Acts and Resolves, Session 1693. Entitled 'An Act for encouraging the Post Office.' Disallowed order-in-council, Nov., 1696.

[43]Chap. xliv, Mass. Acts and Resolves, Session 1773. Entitled 'An Act to regulate the sale of goods at Public Vendue and to limit the number of auctioneers.' See also note 34 and 35.

should be entrusted to His Majesty's Governor by whom it is more likely to be impartially administered". Governor Hutchinson in an interesting letter of Mar. 26th, 1773 to the Lords of Trade said: "Any permanent additional powers to the select men of towns I conceive cannot be for His Majesty's service or for the true interest of the province." The disallowance of this act in Apr. 1774 represents one of the many fruitless attempts on the part of home Government to check the encroachments of the popular municipal governments on the prerogatives of the crown.

Another reason for disallowance which we have grouped under our third head, was in the case of laws contrary to the provisions of the Massachusetts charter by which Massachusetts assumed unwarranted powers. An act[44] of the first Massachusetts Assembly of 1692 comes under this head. The only reason I can discover for its disallowance is a short extract from a letter of the Privy Council. This letter is very ambiguously worded and no real reason is given beyond the inference that a certain clause in the act referring to the appointing of inferior courts and justices of peace was contrary to the conditions of the Massachusetts charter of 1691.

The next act[45] to be considered was also passed in 1692. It was disallowed because it altered the qualifications of freeholders as laid down in the charter from £50 to £40. This was not an attempt to make their charter more liberal, but was due to an error in the duplicate copy of the charter which had been sent over to the province. In the provincial copy of the charter the property qualifications had been wrongly copied from the original as being 40 instead of 50 pounds.

Among the acts of the first session there was still another act to be disallowed because it was inconsistent with the terms of the new Massachusetts charter. A clause in this act[46] pro-

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[44]Chap. ix, Mass. Acts and Resolves, Session 1692. Entitled 'An Act for holding Courts of Justice.' Disallowed by order-in-council, August, 1695.

[45]Chap. xxx. Entitled 'An Act for establishing precedents and formes of writts within the Province.'

[46]Chap. xxxii' Mass. Acts and Resolves, 1692-3. 'An Act for the ...lishing of Judi...atories and Courts of Justice within this Province.' ...lowed order-in-council, Aug. 22, 1965. See Note 26.

vided that if either party in a colonial law suit was not satisfied with the judgment of any of the Colonial Courts "in a *personal action and none other* where the difference did not exceed 300£, they might appeal to His Majesty in Council." It was objected by the legal advisor of the Crown that the reservation expressed in the words *"and none other"* excluded all appeals to the King-in-council, in *"reall actions."* The act was therefore disallowed. First, because this proviso was not in the words of the charter; and second, because this act would restrict the freedom of appeal to the King-in-council as laid down in the charter. No doubt the Home Government was of the opinion that the right of appeal to the King-in-council not only was guarantee of the rights of her subjects in America but also was a useful device for maintaining her Imperial connection with the colonies. As it actually worked out, however, the freedom of appeal to the King-in-council was a privilege of rather doubtful value from the colonial standpoint. It was found to be a very lengthy and excessively costly process in which redress was not always certain. It was the opinion of Thomas Pownall,[47] one of the keenest governors that England ever had in Massachusetts, that the only solution to the problem would be to establish in America a Supreme Court of appeal for all the colonies. The difficulty of communication between England and America was in itself an almost insuperable obstacle to establishing a Court of Appeal in England, while, as Pownall pointed out, the very remoteness of such a court made its decisions seem all the more arbitrary.

The last two acts still remaining to be dealt with under this third general head, occur towards the end of British administration in America. The first of these two acts was passed by the Massachusetts Legislature in 1765 and was entitled 'An act for granting compensation to the sufferers, and free and general pardon, indemnity and oblivion to the offenders in the late Times."[48] The 'late times' referred to was the riot that occurred in Boston after the attempt to enforce the Stamp

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[47]The Administration of the Colonies by Thomas Pownall, 1768; Governor of Massachusetts 1757-1760.

[48]Chap. x, Mass. Acts and Resolves, 1675. Disallowed order-in council, May 16, 1767.

Act of 1765. It was the opinion of the Attorney and Solicitor General of the Crown in regard to this colonial act of general pardon that it was a distinct encroachment on the prerogative of the Crown as defined in the provisions of the charter of Massachusetts. According to the constitution of the province —it was objected—the Council and Assembly of Massachusetts did *not* possess any original right to enact a law of general pardon without previous communication of the grace and pleasure of the Crown. The act was therefore disallowed in 1767.

The second of these two acts has at least this much of interest, it was the last public act of the Massachusetts Assembly ever disallowed by the English government. This act[49] was passed during the sessions of Mar. 1773; but there was nothing in the act (which related to the taking of fish) of any political significance. It was disalloweed on the advice of the Attorney and Solicitor General who gave as his opinion that "the import of this act was inconsistent with that part of the charter of the province which provides that no subject of England shall be debarred from fishing on the coast, creeks or salt water rivers."

IV. The acts to be considered under this fourth general head, are those which were disallowed because they might prove oppressive or harmful in their operation to either English or Colonial subjects.

The first act[50] to be considered under this head dealt with the question of law suits. The act provided that no stranger (i.e. any person who had not been a resident of the province for three years) could have the liberty of commencing suit against any inhabitant without giving security for eighteen months. But the time for which security had to be given was so long that this act would have made it almost impossible for a non-resident to obtain an action against a resident of the

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[49]Chap. xlvi, Mass. Acts and Resolves, 1773. 'An Act to empower the inhabitants of the Town of Rochester in the county of Plymouth to regulate the taking of fish within the harbours and coves of said Township.' Disallowed June 1, 1774.

[50]Chap. xii, Mass. Acts and Resolves, 1695-6. 'An Act that all persons not being freeholders or settled inhabitants commencing suit shall give security before process is granted.' Disallowed Nov. 24th, 1698.

province. This was substantially the objection of the English administration. In referrng to this particular provision the Board of Trade in their report to the Privy Council said: "It appears to us very partially favourable to the inhabitants of the province and injurious to all strangers". The act was therefore disallowed.

The next two acts to be considered under this fourth head were both passed during the sessions of 1699-1700. By the provisions of the first act[51] liberty was given for three trials in the provincial court before sentence or judgment in any case could be final or conclusive. It also made the curious provision that between each of those trials there was to be allowed a liberty of 3 years suspense. But the opinion of the Board of Trade in reference to this provision was: "That the so oft renewing of trials there in the same case and the long suspense before any final issue and determination can be had, is dilatory and vexatious". The English administration was always on the alert to safeguard the interests of their merchants in the colonies as the disallowance of the previous act (Chap. XII) also testifies. The Privy Council accepted the opinion of the Board and this act was also disallowed.

The second of these two acts passed during the sessions of 1699-1700 was entitled 'An act for the better preventing of infectious sickness'.[52] This act was open to several objections. In the first place the board thought that the penalties for the enforcement of this act were too severe. Again it was objected that the interpretation that might be placed on the terms 'contagious', 'epidemic' and 'prevailing sickness' as used in the terms of the act, was 'too uncertain and capable of great abuse'. Finally it was objected that there was "no such act as this in any other of His Majesty's plantations". The act was therefore disallowed.

The next three acts to be noted under our fourth general head were the only acts to be disallowed on a petition to the home government.

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[51]Chap. iv, Mass. Acts and Resolves, 1699-1700. 'An Act for regulating and directing the proceedings of Courts of Justice estab. and within the province.' Disallowed Oct. 22, 1700.

[52]Chap. vii, Mass. Acts and Resolves, 1699-1700. Disallowed Oct. 22, 1700.

The first of these three acts was 'An act for the better regulating the culling of fish'.[53] Three English merchants presented a petition to the Board on behalf of themselves and several other merchants trading to New England requesting that this act be disallowed. Mr. Dummer, the colonial agent for Massachusetts, was present at the meeting of the Board as well as the three English merchants. Both sides were given a hearing and fair consideration. Mr. Dummer speaking for the act explained that its purpose was to advance the quality of fish as the inspection of pitch, tar and turpentine had done for those commodities. However, the spokesman for the English merchants, Mr. Storke, objected that since the 'sworn cullers' provided by the act, were dependent on the merchants who sold fish or were in the business for themselves, they often showed great partiality for their own interests, nor were they always particular as to the quality of fish they allowed to be exported. To prove his contention that the act instead of improving the quality of fish had done the very reverse, letters from merchants in Oporto were produced affirming the poor quality of fish shipped there from Massachusetts. The Board was finally convinced therefore that this method of regulation was prone to abuse, besides being manifestly unfair to many merchants, who according to this law, were subject to a penalty unless all their fish was culled by a 'sworn culler.' The act was therefore disallowed. The second act[54] to be disallowed on petition to the home government was but one incident in a series of efforts to secure complete religious liberty in the province of Massachusetts. On the passing of this act in 1722 a great number of petitions had been sent to Governor Shute and to the General Court asking for its repeal. But as none of the efforts to have the act repealed by the colonial authorities were successful, the aggrieved parties finally turned to the Home Government, and numerous petitions were sent over asking for the disallowance of the act. The injustice of the act consisted in the fact that the people of Tiverton and Dartmouth considered themselves to have been unfairly assessed. They

[53]Chap. iv, Mass. Acts and Resolves, 1718-19. Disallowed, May 7, 1721.

[54]Chap. viii, Mass. Acts and Resolves, 1722. 'An Act for apportioning and assessing 6232£, 13s, 11d.' Disallowed Jan. 2, 1724.

claimed that by this act their taxes had been increased by 100£ over the assessment of the previous year. This increased assessment, they claimed, was for the support of the Presbyterian clergy in Tiverton, Dartmouth and New Bristol. Several Quakers had been committed to the common jail at New Bristol because they had refused to pay their taxes. A petition was sent to the Privy Council praying for the release of those Quakers who were then in gaol. Other petitions were also sent asking for the disallowance of the act. The act was carefully considered by the legal advisor of the Crown, Mr. West, who reported that legally the act was quite sound and that therefore he had no objection to it. However the Board of Trade was of the opinion that this act was really an unjust one, since the Presbyterian element having the ascendency in the Assembly had assumed to themselves the authority of an established church, and had attempted to compel the Quakers in the towns of Dartmouth and Tiverton, who were infinitely in the majority, to pay a large maintenance to the Presbyterian ministers. Moreover, while this act did not violate the letter of the Massachusetts charter, yet the Board was of the opinion that the spirit of the charter had been violated in respect to freedom of conscience; since according to the charter granted to Massachusetts the foundation of the colony was laid on absolute and free conscience. The Privy Council recognized the essential justice of this position by disallowing the act and by ordering the release of those who had been imprisoned for their refusal to pay their taxes. The repeal of this act was an important victory for the friends of religious liberty in Massachuttes and established a valuable precedent.

The third and last act[55] to be disallowed on petition to the Home Government was very similar to the preceding act and a part of the same movement for complete religious liberty. On May 22nd, 1771, a memorial drawn up by Dr. Stenett was read before the Board praying their Lordships "to disallow an act passed in the province of Massachusetts Bay by which Antipedo Baptists[56] and Quakers were compelled to pay for the support

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[55]Chap. v, Mass. Acts and Resolves, 1768. 'An Act for erecting a new Plantation called Huntingdon in the County of Hamshire, into a town by the name of Ashfield.' Disallowed, 1771.

[56]Anabaptists—a sect of Baptists opposed to child baptism.

of a minister of a different persuasion". The Board after taking this act into consideration ordered that a representation be drawn up recommending its disallowance. This was accomplished by order-in-council of 1771. This completes the list of forty-seven public acts that were disallowed.

Turning next to the private acts that were disallowed during this period, there is not much to be said, because only 12 private acts in all were refused the Royal assent and the information regarding them is very scant. In the Governor's instructions of 1724-5 we find that they were forbidden to give their assent to any private act unless proof should have been made that the public notice of the parties intention to apply for such an act had been given, and unless the act contained a suspending clause. No private acts were passed from the date of these Royal instructions till 1742—a period of eighteen years. In 1742, however, a private act to take off the entail from certain lands in Ipswich was disallowed. Between 1757-1768 there were twelve private acts passed of which number five were disallowed. From 1768 down to the close of the colonial period only three private acts were passed, though none of these were disallowed. In all only twelve private acts were disallowed. As for the reasons for their disallowance scarcely any record appears to exist. The only specific reason for disallowance, that I have noted, is in connection with two private acts passed in 1757-8. These were disallowed because they bore no memorandum of publication and were not under seal.

This completes our task of anaylsing the 59 public and private acts disallowed by the English Crown during this eighty-three years of Massachusetts history as a Royal province. Out of the total forty-seven public acts, eight were disallowed because they were contrary to the acts of navigation and trade. But Massachusetts traders knew of ways to evade those laws far more effective than the passing of legislative acts. Six acts were disallowed very necessarily and justly because they might in their operation prove oppressive or harmful to either English or Colonial subjects. Thirteen were disallowed because they disregarded the Royal prerogative or were contrary to the provisions of the Massachusetts charter. Twenty, or nearly half of the total number of public acts, were disallowed because they were repugnant to the laws of England, or were

not properly drawn up, or were legally unsound. On the other hand, considering that over 70% of all the laws disallowed for Massachusetts come between 1691-1707, a period of fifteen years, it is not surprising to find so many disallowed for the last mentioned reasons. The period after 1691 was necessarily a period of adjustment for Massachusetts and for the Home Government. The old charter privileges and former freedom of Massachusetts were not easily supplanted. These first fifteen years, therefore, represent the efforts of the Massachusetts Legislature to adjust their methods and measures to the new conditions imposed on them as a semi-royal colony. It must also be taken into account that the Glorious Revolution of 1688 and the passing of the Bill of Rights had profoundly stirred all the American colonies. For instance, in Chapters XI and XLII[57] of that first session of the Massachusetts Assembly under direct Royal control we see the attempts of the English colonial to establish definitely by legislative enactment those rights and privileges that Englishmen had gained for themselves in the motherland. But after this great outbreak of popular feeling there was naturally enough a strong reaction which left a very definite impression on colonial policy and is quite evident in the vigorous exercise of the Royal disallowance during these first fifteen years of Royal control in Massachusetts. It was the definite policy of the Home Government to bring all the American colonies into closer dependence on the English Crown. The creation of a new Board of Trade and Plantations by William III in 1696 was a part of this definite policy looking towards closer control and greater efficiency in Colonial Administration. It is not mere chance, therefore, that the period of the Board of Trade's greatest efficiency and usefulness—i.e. from 1696 to about 1714—was the period when Massachusetts legislation was most closely watched, and when the most serious efforts were made to keep colonial legislation in harmony with English laws and with the rights of the English Crown.

From 1714 down to 1748, the time of Walpole and Newcastle, was the period of greatest inefficiency and slackness in colonial administration when the Board of Trade only met on

[57]See Note 19 and 21 for scope and discussion re reasons for disallowance.

an average about ten times a month instead of on an average of about five times a week as formerly. The secretary of State for the Southern Department now took over the direction of colonial affairs instead of the Board of Trade which was degraded to the position of a mere advisory body with no executive powers. But the ignorance and incapacity of Newcastle as the executive head of colonial affairs was colossal. "Annapolis, Annapolis! Oh yes! Annapolis must be defended," he is reported to have said. "To be sure, Annapolis should be defended. Where is Annapolis?"[58] Under these conditions it was quite natural that colonial affairs were allowed to drift as they would and that between 1714 and 1748 only four Massachusetts acts in all were disallowed.

From 1748 down to 1766 the powers and efficiency of the Board of Trade were revived under the able presidency of men like Halifax, Townshend and Shelburne. One of the most fatal errors ever made in British Colonial Administration was that in 1757 the Board of Trade and Plantations was not created as a separate department with Halifax as secretary of State for the colonies. Pitt, I believe, was responsible for that mistake. In the first place he was unwilling to part with any of his powers by creating a third Secretary of State.[59] He also failed to realize that the problems of colonial administration and government was of just as much importance in safeguarding English interests in America as the problem of wresting Canada from the French. He therefore threw a sop to Halifax's legitimate ambition to be a third Secretary of State by admitting him as a member to his cabinet. The position of the president of the Board of Trade as a Cabinet Minister greatly increased the prestige and efficiency of the Board which was also maintained during the short terms of Townshend and Shelburne. During this period of increased executive power we find a corresponding tightening up of control over colonial affairs which

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[58]H. Walpole. Memoirs of the last ten years of George II. Quoted in Egerton, British Colonial Policy.

[59]"Lord Halifax had often and lately been promised to be erected into a Secretary of State for the West Indies. Mr. Pitt says: No, I will not part with so much power." Fitzmaurice's Life of Shelburne. Letter of June 20, 1757.

is evident in Massachusetts legislation. Between 1748 and 1768 over eleven Massachusetts acts were disallowed.

By order-in-council of 1766 the Board of Trade was again degraded to a mere advisory body and shorn of its executive and constructive powers. From 1768 down to the end of the colonial period only two acts were disallowed for Massachusetts. It must be added, however, that the general slackness of the British Administration from 1714 to 1748 and again from 1766 down to the end of the colonial period does not entirely explain the comparatively few disallowances that occur in those periods. After a number of years of Royal control Massachusetts began to adapt herself to the new restrictions, and so successfully that the Home Government never really realized that the affairs of the colony were gradually drifting beyond its control. At first, Massachusetts adopted the plan of passing acts for a limited time so that they would have had their effect before they could be disallowed by the Home Government. To check this the Governors were instructed to insert a suspending clause in bills that might affect Imperial interests, so that they should not go into effect until the Royal approval had been given. We have noticed that Massachusetts successfully avoided this device, though three of her acts[60] were clearly disallowed because they contained no suspending clause. However, Massachusetts finally evolved a much shrewder method of avoiding a direct clash with the Home authorities and at the same time of getting her own way, namely by passing as resolves what as legislative acts would have eventually gone to the Home Government only perhaps to be disallowed. When it is remembered that for Canada seventy provincial acts were disallowed between 1867 and 1890, a period of twenty-three years, the number of public acts disallowed for Massachusetts—only forty-seven in a period of eighty-three years—seems amazingly small. To talk about 'British oppression' in the matter of Imperial control over Massachusetts legislation is manifestly absurd. Apparently it was not a question of excessive control but of spasmodic and inefficient control. If in 1757 Pitt had only had a truer vision of the real problem in America, if England's sense of government had only kept

[60]See Chap xvi, 1730-31, note 32; chap. i, 1757-8, note 33; chap. v, 1765-6, note 36.

pace with her wonderful expansion, there might have been a different story to tell. The fact was that England had been too much engrossed in her political tilts at home and in her battles on land and sea abroad, which laid the basis of a future Colonial Empire, to realize that her Colonial Empire in America was slowly but surely slipping away from under her control. In 1757 it would not, I believe, have been too late to have remedied this by the creation of an intelligent and efficient Colonial Office as a separate department of government. By 1774 repression, rather than intelligent direction, was England's only resource, and the golden opportunity to retrieve the mistakes of the past was forever gone.

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